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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 218.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY,
Appellant,

v.

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,
Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR THE APPELLANT.

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BRIEF FOR THE APPELLANT.

Opinions Below.

No opinion was filed either by the Supreme Court Appellate Division or by the Court of Appeals, but a short decision by the Appellate Division (R. pp. 81, 82) is reported in 246 App. Div. 652; 285 N.Y.S. 1045, and the per curiam affirmance by the Court of Appeals with amendment to remittitur (R. pp. 86 to 88) are reported in 271 N.Y. Mem. 90 and 114; 3 N.E. (2d) 201 and 213.

The decision of the Appellate Division of the Supreme Court of New York affirming the determination of the respondents states the question as "whether the State of

New York has jurisdiction to tax as income profits derived by a non-resident from the sale of an interest in a membership on the New York Stock Exchange," and says that the tax was imposed under section 351 "upon such profit as income upon property within the State of New York" (R. p. 81; fol. 243).

Jurisdiction.

Jurisdiction of this Court is supported under section 237 (a) of the Judicial Code as amended, because the validity of a state statute (secs. 351 and 351-a of the New York Tax Law) was clearly and seasonably drawn in question on the ground that the statute as interpreted was repugnant to the Constitution of the United States and the decision was in favor of its validity, the highest court of the state in which a decision could be had having passed upon the question and decided it against the appellant.

See appellant's claims for refund (R. pp. 38, 42; fols. 113, 114, 125, 126); his statutory petition to review the assessment (R. p. 11; fol. 33); the decision of the Appellate Division of the Supreme Court of New York (R. p. 81; fol. 243); the amended remittitur of the Court of Appeals at R. p. 88 and Statement as to Jurisdiction on Appeal previously filed in this Court and separately printed.

Mayflower Farms, Inc., v. *Ten Eyck*, 297 U.S. 266.

Atlantic Lumber Co. v. *Comm. of Corporations & Taxation*, 298 U.S.—, 80 L.E. 908.

The final order and judgment sought to be reviewed was entered June 1, 1936 (R. p. 90), upon remittitur from the

Court of Appeals as amended (R. pp. 86, 88). The petition for appeal was presented and allowed June 16, 1936 (R. p. 92).

Further consideration of the question of the jurisdiction of this Court and of the respondents' motion to dismiss or affirm was postponed to the hearing of the case on the merits by order entered in this Court on October 12, 1936.

The Question Presented.

The appeal presents the question of the validity of a New York tax upon "income from property owned in New York" levied by the respondents against the appellant, a resident of Massachusetts who never had a domicile or place of business in New York and never carried on business there, on profit resulting to him from the sale in 1929 of a fraction of his membership in the New York Stock Exchange, an unincorporated association organized in 1799.

The tax statute, sections 351 and 351-a of the New York Tax Law, is assailed upon the ground that, as applied, it violates the due process clause of the Fourteenth Amendment of the Constitution of the United States. The proceeding was a statutory one, instituted by appellant in the Supreme Court for Albany County, New York, to review the assessment made for the year 1929. The Appellate Division of that court and the New York Court of Appeals affirmed the tax.

The New York Tax Statute Involved.

The sections 351 and 351-a involved in this cause are part of the New York State Income Tax Law, being article 16 of the State Tax Law, chapter 60 of the Consolidated Laws of New York, and may be found in book 59 of McKinney's Consolidated Laws of New York, Annotated, at pages 643

and 644, or in Cahill's Consolidated Laws of New York, 2d Edition (1930), chapter 61, pages 2388 and 2389. They are as follows:

"§ 351. **Imposition of income tax.** A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars, but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, and for any taxable year ending during the year nineteen hundred and nineteen."

"§ 351-a. **Reimposition of tax against non-residents.** The tax provided for in section three hundred and fifty-one of this chapter, upon and with respect to income derived from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state, is hereby reimposed with respect to the taxable income for the calendar year nineteen hundred and nineteen and for any taxable year ending during the year nine-

teen hundred and nineteen, and for each year thereafter. Such tax shall be levied, collected and paid for the year nineteen hundred and nineteen, and returns with respect thereto shall be filed on or before June thirtieth, nineteen hundred and twenty, unless the time shall be extended as provided in this article."

Statement of Facts.

The New York Stock Exchange is an unincorporated association holding the beneficial ownership of the stock of the corporation owning the land and building in New York City where business on the Exchange is transacted. It is supported by dues and charges made against and paid by its members. Membership is evidenced by a certificate in the form of a letter signed by the secretary of the Exchange. It can be transferred only with approval of the Exchange (R. pp. 45, 53, 54; fols. 134-5, 157-8, 161).

In 1929 the Exchange increased its membership 25 per cent, from 1100 to 1375, by issuing in the nature of a stock dividend to each of its then members a so-called "right" representing one-quarter interest in a new membership, four of said "rights" together entitling the holder to one of the new memberships (R. p. 45; fol. 133). The "right" was evidenced by a letter from the Exchange secretary (R. p. 74; fol. 222). The appellant, a member of the Exchange and of the Boston firm of Whitney & Elwell since 1909, sold such right through the Exchange with its approval for $108,000, giving a power of attorney to a resident of New York to complete the sale (R. p. 75; fols. 223-4). The appellant's membership was an asset of his firm, the four partners having equal 25 per cent interests therein (R. p. 47; fol. 140). The tax in question was upon the single item of profit represented by the appellant's share of the difference between this sale price and one-fifth of the price origi-

nally paid for the membership plus capital additions (R. pp. 47, 48, 54; fols. 139, 144, 160). Never before or since this contested tax has the New York Tax Commission endeavored to tax the appellant or his partners.

The appellant and his partners have always been domiciled in Massachusetts. He and his firm have been in the securities business in Boston since the date of acquisition of his membership, with their only office there. Neither the firm nor any of its members has ever had an office, domicile or abode in New York, nor did they ever carry on business there. They did not buy and sell securities on the Exchange for their firm account (R. pp. 46-8, 59; fols. 137 to 142, 175).

The firm's business consisted almost entirely of commission orders from customers received at its Boston office for the purchase and sale of securities listed on the New York Stock Exchange. None of this was conducted by the appellant or members of his firm on the floor of the Exchange or in New York State; orders requiring execution on the Exchange were all telegraphed to independent firms, members of the Exchange who had business offices in New York and who executed and completed the orders on the Exchange in their own names as principals (R. pp. 49, 59; fols. 145-7, 177). These independent New York firms acted as correspondents for the appellant's firm, lending money on the security of the stocks purchased and other collateral delivered to them (R. pp. 48, 69, 70; fols. 142, 207-9).

The arrangements were substantially those of margin accounts carried by Whitney & Elwell with their correspondents on a written or oral agreement embodying the terms of Exhibit A, introduced at the hearing before the Tax Commission (R. pp. 50, 51, 69-72). Whitney & Elwell was a margin customer of the New York firms (R. p. 51; fol. 152). Neither the appellant nor his firm ever had anything to do with the execution or completion of the orders sent to New York (R. pp. 49, 64; fols. 146, 191). The margin

carried did not necessarily accord with the margin required by Whitney & Elwell from its customers (R. p. 61; fol. 183). The stocks purchased were usually left with the New York correspondents, but sometimes they were brought over to Boston and put in Whitney & Elwell's box or as collateral in a loan (R. p. 58; fol. 174). Each transaction was entered as a debit or a credit on the open running accounts carried by Whitney & Elwell with its correspondents. There was no check sent on each transaction (R. p. 61; fol. 181). This business of Whitney & Elwell involved approximately $150,000,000 worth of securities in 1929 (R. p. 66; fol. 198). The very small bank account carried in New York had nothing to do with this business and was carried only for convenience (R. p. 58; fols. 174, 175).

Whitney & Elwell's customers did their margin business on an agreement substantially similar to the Exhibit A, above referred to. It was not signed by the customer, but was contained in the printed matter on the confirmations sent to the customer reporting the execution of his order (Exhibits C and D (R. p. 73) introduced at the hearing before the Tax Commission, R. pp. 57, 60; fols. 171, 172, 180).

The Exchange rules prescribe a minimum commission which must be charged by all members for the execution of orders for non-members. By reason of the appellant's membership in the Exchange his firm is able to have their New York correspondents execute orders at 40 per cent of the commission fixed for non-members. Whitney & Elwell charges its customers the fixed minimum commission which the customer would have to pay any Stock Exchange house through whom he did business and pays 40 per cent of that commission to the New York correspondent who actually executed the order in New York, retaining the other 60 per cent as its compensation. This division of the commission was fixed by mutual agreement between Whitney &

Elwell and the New York firms which actually did the business (R. pp. 51, 52, 62, 67, 68; fols. 153-6, 184-9, 201, 202).

The appellant's profit on the sale of his "right" was required to be reported as taxable income at his domicile in Massachusetts, although deductions for other losses resulted in no Massachusetts tax being actually paid (R. pp. 36, 39; fol. 117).

Errors to be Argued.

As assigned (R. pp. 90, 91) it is urged that there were errors as follows:

1. In holding that the appellant, a resident of Massachusetts who never had an office or place of business in New York, was subject to income taxation under sections 351 and 351-a of the New York Tax Law on profit resulting from the sale of a fraction of his New York Stock Exchange membership.

2. In holding that the appellant's fractional Exchange membership which he sold in 1929 was "property owned" in New York.

3. In holding that the appellant's Exchange membership had acquired a "business situs" in New York sufficient to permit profit from the sale of a fraction thereof to be taxed as income "from property owned" in New York.

4. In failing to reverse the order of the Supreme Court Appellate Division, Third Judicial Department, and the determination of the respondents because the tax levied against appellant was unconstitutional and void as beyond the jurisdiction of New York.

Summary of Argument.

I. In the absence of a situs for his Exchange membership created by the carrying on of business in New York, that state has no jurisdiction to tax the appellant.

The contested tax was levied and is supported as tax on income "from property owned" in New York—not as a tax on business carried on in New York. A New York Stock Exchange membership is intangible personalty; not an incorporeal hereditament, and therefore it is subject to property taxation only at its situs, the owner's domicile. Unless the appellant's membership acquired a "business situs" in New York as a result of the appellant carrying on business there, the jurisdiction to tax appellant's profit resulting from the sale of his fractional membership was with the state of his domicile, not with the respondents. Intangibles owned by and profit resulting to non-residents from their sale are, respectively, property and income at their situs, the domicile of their owner. They cannot be taxed at the same time for the same reasons by two states. New York has no jurisdiction to tax them.

II. The appellant's membership had not acquired a "business situs" in New York.

This Court will itself inquire as to the existence of such a situs. It is a manifest contradiction to support a "business situs" where no business is carried on. The cases establishing "business situs" do not cover the appellant's case. The decision in *Rogers* v. *Hennepin County*, 240 U.S. 184, when correctly analyzed, and particularly in the light of subsequent decisions of this Court, does not govern the appellant's case. There is no reason or decision supporting a "business situs" in New York for the appellant's membership.

III. The unsoundness of the respondents' position.

There can not be a dual situs regardless of business transacted. The appellant is not a partner in a New York enterprise. He was not taxed as such. Neither he nor his firm were carrying on business there. Illustrative analogies clearly support the appellant's position.

IV. Conclusion.

Argument.

I. In the Absence of a Situs for his Exchange Membership Created by the Carrying on of Business in New York, that State has No Jurisdiction to Tax the Appellant.

The tax levied against the appellant was assessed against him on the ground that in 1929 he had income "from property owned" in New York. The respondent Tax Commissioners have never, before or since the tax here involved endeavored to impose an income tax on the business of the petitioner or his firm. They do not attempt to sustain the instant tax under the second clause of the taxing language as a tax upon the appellant's income from a business "carried on in this state." Obviously the appellant's firm, Whitney & Elwell, were not carrying on a business in New York by any definition.

> *Bank of America* v. *Whitney Bank*, 261 U.S. 171.
> *Hovey* v. *DeLong Hook & Eye Co.*, 211 N.Y. 420.
> Article 415 of the Regulations of the New York State Tax Commission contained in Manual 32 issued by said Commission and printed in Appendix, page 29, *infra*.

Although actual transfer of the fractional membership or "right" was concluded in New York, this cannot sus-

tain the respondents' position, because the tax assessed is an income tax and not a tax upon a sale or transfer.

> See Article 416 of the Regulations of the Tax Commission, quoted in Appendix, pages 29-30, *infra,* which declares that profits of a non-resident on sales of securities, even though consummated in New York, are not taxable except to the extent to which they are a part of a business carried on in New York.

The legal nature of a New York Stock Exchange membership or "right" is substantially identical with that of shares in a close corporation. They were represented by letters from the Exchange secretary similar to certificates of stock. The member's rights and duties under the constitution and rules are like those of a stockholder. The member's interest, entitling him to a proportional part of the benefits and effects of the organization when dissolved, after payment of its debts, was like ownership of corporation shares, intangible property which attached to the person of the owner in the state of his domicile. *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U.S. 69, 81; *Eisner* v. *Macomber,* 252 U.S. 189, 213-214. The restrictions on transfer do not change this. *Ripin* v. *United States Woven Label Co.,* 215 N.Y. 442; *Barrett* v. *King,* 181 Mass. 476. The "right" which gave the owner and three other members the power, subject to by-law restrictions, to add a new member to share the benefits and duties was even more in the nature of a personal intangible chose in action attaching solely to the owner's person.

This Court has determined a New York Stock Exchange membership to be intangible personalty, subject to local property taxation at the Ohio domicile of the owner. The contrary theory that an Exchange membership was so bound up with the physical location of the Exchange as

to be like real property, and consequently subject to property taxation only in New York, was rejected. Thus it has been authoritatively decided by this Court that a New York Stock Exchange membership is property owned at the owner's domicile in Ohio, not in New York. So the appellant's membership and fractional "right" are property owned at his domicile in Massachusetts.

> *Citizens National Bank* v. *Durr,* 257 U.S. 99. See particularly page 109, where it is pointed out that, if the membership had been held an incorporeal hereditament owned in New York, it would have had a taxable situs *only* in New York. *Louisville & Jeffersonville Ferry Company* v. *Kentucky,* 188 U.S. 385.

Recent decisions of this Court definitely overruling at least one earlier case * have made it clear that acquisition of a "business situs" in a state other than that of the domicile of the owner is the only basis for taxation of intangible personalty elsewhere than at the owner's domicile. In the absence of such a "business situs," the only state which has jurisdiction of intangibles for purposes of taxation is the state of the owner's domicile, where by force of the maxim *mobilia sequuntur personam* the intangible property is owned and has its situs.

> *First National Bank* v. *Maine,* 284 U.S. 312, holding shares of a domestic corporation owned by a non-resident decedent not subject to local death transfer taxation, where it was said, p. 331:
>
> "We do not overlook the possibility that shares of stock, *as well as other intangibles, may be so used* in a

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* *Blackstone* v. *Miller,* 188 U.S. 189, permitting a local tax on bank deposits owned by a non-resident on the theory that the taxing state had some part in protecting the intangible and hence power to tax it, stated to be no longer law in *Farmers Loan & Trust Co.* v. *Minn.,* 280 U.S. 204, at 209.

state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property." (Italics ours.)

Beidler v. *South Carolina Tax Comm.*, 282 U.S. 1, reversing the South Carolina courts and holding an Illinois majority stockholders' loan to a South Carolina corporation not subject to death transfer tax, as no "business situs" was shown.

Baldwin v. *Missouri*, 281 U.S. 586, holding cash in banks, bonds and notes secured by local mortgages, all kept in Missouri but owned by a non-resident not subject to death transfer tax in Missouri.

Farmers Loan & Trust Co. v. *Minn.*, 280 U.S. 204, holding bearer and registered obligations of Minnesota or its municipalities owned by a non-resident and not there used in a business not subject to taxation in Minnesota.

The principle underlying these cases is applied as the general rule as to intangible property and yields only to established facts of *legal* ownership, actual presence and control elsewhere or in cases where its application would result in unreasonable and patent injustice. *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83, 93, 94. That decision does not affect this appellant's case, because the legal title and beneficial ownership of his membership and "right" are both in him in Massachusetts.

Unless the facts show that an intangible has acquired "business situs" in New York, the above cases make it clear that it is beyond that state's jurisdiction under the Federal Constitution to tax profit resulting to a non-resident from the sale of intangibles owned by him as income from "property owned in" New York.

It is manifestly inconsistent to say that two states can at the same time tax the same property as property owned

in both states. The property is owned and taxable in one place only. In the nature of things it cannot be simultaneously owned and taxed in two states on the same theory.

> *Frick* v. *Pennsylvania*, 268 U.S. 473.
> *R.I. Hospital Trust Co.* v. *Doughton*, 270 U.S. 69, *supra*.

Paraphrasing the language of this Court's opinion in *First National Bank* v. *Maine*, 284 U.S. 312, *supra*, at the bottom of page 326 and top of page 327, due regard for the processes of correct thinking compels the conclusion that a determination fixing in one state the local situs of a thing for the purpose of determining ownership carries with it an implicit denial that there is a local situs in another state for the same purpose.

For New York to have jurisdiction simultaneously with Massachusetts to tax, as income from "property owned in" New York, profit resulting from the sale of an intangible which by decision of this Court (*Citizens Nat. Bank* v. *Durr*, 257 U.S. 99, *supra*) has been determined to be owned in Massachusetts necessarily involves the application of "inconsistent principles." The view that two states both have power to tax the same thing "on different and inconsistent principles" has been "distinctly rejected."

> *First National Bank* v. *Maine*, 284 U.S. 312, *supra*, bottom of page 324.

It might not be inconsistent legal theory to hold that the net rental received at the owner's domicile from foreign real estate is income subject to tax at the owner's domicile. It is clearly inconsistent legal theory to say that profit from the sale of an intangible is both income in the state of the appellant's domicile and simultaneously, irrespective of a "business situs," income of the owner in another state whose only connection with the intangible

was the fact that the issuer thereof was organized under its laws.

Being an intangible, the appellant's Exchange membership and "right" were property owned and taxable at their situs, the appellant's domicile in Massachusetts. They were not "property owned" in New York, particularly in this case, where the appellant was a complete non-resident without home or business in New York, and so New York cannot have jurisdiction to tax them as property owned there.

The question presented is not one of double or multiple taxation. It is a question solely of New York's jurisdiction to tax and its inability under the Federal Constitution to levy the contested tax because there was no "property owned" there, income from which could be taxed. General statements from opinions* of this Court to the effect that there is nothing in the Federal Constitution or its Fourteenth Amendment preventing double taxation by two or

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* See *Kidd* v. *Alabama*, 188 U.S. 730, at 732; *Hawley* v. *Malden*, 232 U.S. 1, at 13; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U.S. 54, at 58; *Coe* v. *Errol*, 116 U.S. 517; *Baker* v. *Druesedow*, 263 U.S. 137; *Cream of Wheat Co.* v. *Grand Forks County*, 253 U.S. 325; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U.S. 350, at 367-8. It should be noted that none of these cases actually involved multiple taxation in the strict sense—*i.e.*, taxation by more than one state of the same thing on a legal theory inconsistent with the theory of taxing the same thing in another state. Thus in *Kidd* v. *Alabama*, the tax upheld was a death duty on shares in non-resident companies owned by a resident, and there was no tax elsewhere on a theory inconsistent with that applied—that intangibles are for taxation purposes situated at their owner's domicile. In *Hawley* v. *Malden*, a Massachusetts income tax on dividends received by a resident from foreign corporations not doing business in Massachusetts was upheld and there was no showing of another tax on an inconsistent theory. It was specifically stated (232 U.S. p. 13) that the Court did not decide whether "a provision by the State of Incorporation fixing the situs of the shares for the purpose of taxation in that state by whomever owned, would exclude the taxation of the shares by other states in which their owners reside." In *Coe* v. *Erroll* the

more states are not in point, for the issue here is one of jurisdiction to tax, not double taxation.

One of these opinions, that in *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U.S. 54, sustaining a Kentucky property tax on a resident's bank credits in Missouri, is particularly illustrative in the case at bar. In stating that "liability to taxation in one state does not necessarily exclude liability in another," this Court there noted that the same credits could have been taxed in Missouri under the decided cases of "business situs" which are discussed under Part II of this brief, pages 18 to 20 (*Liverpool & L. & G. Ins. Co.* v. *New Orleans,* 221 U.S. 346; *Metropolitan Life Insurance Company* v. *New Orleans,* 205 U.S. 395). The second taxation in Missouri depends upon the acquisition in Missouri, by use there, of a "business situs" for the credits. With the acquisition of such a situs the second tax is upon a theory which is not inconsistent with the first tax at the owner's domicile, so the Fourteenth Amendment does not prevent it. Without the acquisition of such a "business situs," identical bank credits have been held "not within Missouri for taxation purposes." *Baldwin* v. *Missouri,* 281 U.S. 586, at 593, *supra.*

The taxation of intangibles or profit resulting from their sale elsewhere than at the owner's domicile would disregard this clear holding as well as those of *Farmers Loan & Trust Co.* v. *Minnesota* and *First National Bank* v. *Maine,* on which it is based.

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tax was on a non-resident's tangible property in the taxing state. There was no tax on the same property elsewhere. The other tax involved was of the taxpayer's business at his residence which does not involve any theory inconsistent with the taxation of tangibles by the state where they are. *Baker* v. *Druesedow* involves only the method of assessing local property taxes; *Cream of Wheat Co.* v. *Grand Forks County* and *St. Louis Southwestern Ry. Co.* v. *Arkansas* involve local franchise taxes measured by property outside the state. Conflicting taxes levied on inconsistent theories were not presented by the facts in those cases.

There is no decision of this Court sustaining in the absence of a "business situs" the validity of a state income tax on profit resulting to non-residents from the sale of intangibles. *People, ex rel. Blagden,* v. *Lynch* and *People, ex rel. Sackett,* v. *Lynch,* 291 U.S. 652; 292 U.S. 602, 608, dismissing appeals from 238 App. Div. 881; 263 N.Y. 568, are not such authority, because the appellant taxpayers in both cases, although non-residents, had business offices in New York, carried on business there and paid uncontested income taxes thereon in addition to the contested assessment on their Exchange membership sale profits. The memberships in those cases clearly had acquired "business situs" in New York because they had been used by the owners as part of their business in personally executing orders on the floor of the Exchange. That the tax in those cases was explicitly rested on the acquisition of such a "business situs" appears from the notice of assessment in the *Blagden* case (*Blagden* record, fol. 113) and from the hearing in the *Sackett* case (*Sackett* record, fol. 136).

Shaffer v. *Carter* and *Travis* v. *Yale & Towne Manufacturing Co.,* 252 U.S. 37 and 60, sustaining income taxes on non-residents, concerned only business carried on and real or tangible property owned by non-residents in the taxing state. In *Shaffer* v. *Carter, supra,* at page 57, it was stated that the jurisdiction of a state to tax non-residents "extends only to their property owned within the state and their business, trade, or profession carried on therein."

It follows that New York has no jurisdiction to levy the contested tax unless a "business situs" was acquired there by the appellant in 1929. Such an inability to tax is not cured by the provisions of the law allowing credit to non-residents for taxes paid to their home states.

First National Bank v. *Maine,* 284 U.S. 312, *supra,* where identical provisions for credit were not permitted to validate the tax.

II. The Appellant's Membership had Not Acquired a "Business Situs" in New York.

This Court will itself inquire as to whether the facts presented are sufficient to give the intangible a "business situs."

> *Beidler* v. *South Carolina Tax Comm.*, 282 U.S. 1, *supra,* where determination of the state courts that there was a "business situs" was reversed.

It seems manifest contradiction to support the result in the case at bar upon a theory of "business situs" in New York when it is clear and admitted that neither the appellant nor his firm were doing a taxable business there on any conceivable theory. *Bank of America* v. *Whitney Bank,* 261 U.S. 171, *supra.*

"Business" carried on elsewhere certainly cannot give a "business situs" in New York. When used by itself and when used with "situs," the word "business" must have approximately the same meaning. None of the decided cases in this Court indicate "business situs" is established by facts such as those existing in the case at bar.

The only authoritative cases in this Court which sustain taxation of intangibles elsewhere than at the owner's domicile on the ground of a "business situs" acquired there, are based on the personal use or employment of the intangibles in business carried on in the second state. Such cases are:

> *New Orleans* v. *Stempel,* 175 U.S. 309, where a non-resident conducted a business of loaning money on Louisiana real estate, through an agent there.
>
> *Bristol* v. *Washington County,* 177 U.S. 133, an identical case except that the evidences of the credits were payable to the non-resident owner and custody of them was not continuously kept by the local agent.

State Board of Assessors v. *Comptoir National,* 191 U.S. 388, where a non-resident company carried on a local loan business through an agent who had custody of the evidences of the credits.

Metropolitan Life Ins. Co. v. *New Orleans,* 205 U.S. 395, a similar case except that the notes were not continuously in the local agent's custody although they were whenever needed for the purposes of the business.

Scottish Union & National Ins. Co. v. *Bowland,* 196 U.S. 611, where bonds deposited with the State of Ohio under its laws regulating the doing of insurance business there were held subject to taxation there.

Liverpool & L. & G. Ins. Co. v. *Orleans Assessors,* 221 U.S. 346, where extensions of premium credits granted to local policyholders as a part of the business of a non-resident company qualified to do business there were held subject to local taxation.

Rogers v. *Hennepin County,* 240 U.S. 184, which sustained a property tax on memberships in a Minneapolis Exchange, in a case where the pleadings admitted personal use of the Exchange membership in business there, and where this Court stated (240 U.S. 191): "But it sufficiently appears from the allegations that the memberships represented rights and privileges *which were exercised in transactions at the Exchange in the City of Minneapolis,* and, we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State, and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." Citing *Tappan* v. *Merchants National Bank,* 19 Wall. 490;

Corry v. *Baltimore,* 196 U.S. 466, and some of the cases listed on the preceding page hereof.

Wheeling Steel Corp. v. *Fox,* 298 U.S. 193, where a Delaware corporation was held to have acquired a "business situs" in West Virginia where was situated its head office controlling widespread activities and credits.

In all of these cases either the owner of the intangible personally used it in the state where "business situs" was established, or the evidences of the intangibles were physically present there or were managed there by the owner himself or by a general agent who had general authority to deal with them. In the appellant's case the owner was not in New York and did not personally use the intangible there. The only connection the appellant had in New York was with independent brokerage firms doing business there, who took and executed in their own names orders received from the appellant's firm, were paid for each item of service rendered in New York and who had no authority to deal with the appellant's property and did not purport in any way to do so.

These independent contractors took and executed the orders of the appellant's firm. They did not have possession or control of Whitney & Elwell's credits. All Whitney & Elwell had in New York were debts due to their correspondents secured by pledge of shares, bonds or other intangibles which did not belong to them but were held by them for their customers' accounts. The property claimed to be owned in New York, so that its sale created the tax contested, is not these intangibles in New York to secure loans; it is the appellant's Stock Exchange membership or fractional "right," neither of which was ever personally used there or even physically present there except when the "right" was sold through a special agent.

In such circumstances there is no "business situs" in New York. Such a situs arises only from the conduct of business within a state, and where no business is so conducted, there is no peg on which to hang the "business situs." *Cessante ratione legis, cessat et ipsa lex.* See *Newport Company* v. *Wisconsin State Tax Commission* 219 Wisc. 293; 261 N.W. 884; cert. den. 297 U.S. 720, in which, applying the principles of the above cases, a state income tax assessment was held invalid against a Delaware corporation doing business in Wisconsin on the ground that there was no "business situs" for the items involved. The items so held to be without "business situs" were profit resulting from (1) the sale of intangible securities; and (2) the sale of patent rights developed as a by-product of research work in the company's laboratories in Wisconsin, both of which were held to be income at the corporation's domicile not in Wisconsin.

With particular reference to the decision of *Rogers* v. *Hennepin County,* 240 U.S. 184, *supra,* and the principle there applied in accordance with the quotation set out above at the bottom of page 19, it is important to note the following three facts which show clearly that the decision is not controlling authority in the case at bar.

1. New York has definitely not fixed the situs of memberships for the purpose of taxation at the place where the Exchange was located. In fact, New York Stock Exchange memberships are not subject to a personal property tax even to resident owners, because the Personal Property Tax Law does not attempt to reach them. New York Tax Law, chapter 60, article 1, section 2(8) and section 4-a; *People, ex rel. Lemmon,* v. *Feitner,* 167 N.Y. 1, 7, 60 N.E. 265, 267; *Matter of Hellman,* 174 N.Y. 254, 256, 66 N.E. 809.

The appellant's case and the *Rogers* case therefore stand on very different bases, because in the latter a local statute has determined a situs for property taxation to both resi-

dents and non-resident owners, while in the former the local statute has not determined a personal property tax situs even for resident owners.

2. The appellant never used his membership personally to execute any orders, whereas paragraph 11 of the amended bill in the *Rogers* case admitted such a personal use by the taxpayers there and did not present the fact, which exists in the case at bar, that the non-resident's membership was involved only in connection with orders for non-resident customers.

3. Since the decision in the *Rogers* case this Court has ruled that two states cannot tax the same thing at the same time on inconsistent legal theories. It follows that, so far as the *Rogers* case stands for the general proposition that, irrespective of statute determining situs for all concerned,* Minnesota can tax as property owned there an Exchange membership owned elsewhere, it, like *Blackstone* v. *Miller*, 188 U.S. 189, *supra*, is limited by the decisions and theories of *First National Bank* v. *Maine*, 284 U.S. 312, *supra*; *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U.S. 204, *supra*, and *Baldwin* v. *Missouri*, 281 U.S. 586, *supra*.

In the situation at bar the real estate and business of the Exchange are taxed in New York to the New York corporation which owns the market place (articles 1, 2, 9, 9a and 9b of the New York State Tax Law, chapter 60 of the Consolidated Laws of New York). As one of the persons for whose benefit are held the shares of this corporation the appellant bears part of the burden of taxation by New York. The actual business of executing orders and carrying securities on margin there is taxed to the New York correspondents of the appellant's firm, who have the offices and do the business there (article 16, section 351, of the

* Such as the National Banking Act provisions sustained in *Tappan* v. *Merchants Nat. Bank*, 19 Wall. 490, *supra*, or the Maryland statute upheld in *Corry* v. *Baltimore*, 196 U.S. 466, *supra*.

New York State Tax Law). The petitioner owned no property in New York and carried on no business there. There is no reason or occasion whatever to make him share directly in the cost of government there.

Unless the standards of facts which can create a "business situs" are to be extended far beyond those set by the decided cases, neither the appellant's membership nor his "right" had any "business situs" in New York. There is no authority for such extension. Nor is there any occasion so to extend them, because the whole theory of taxation based upon the acquisition of a "business situs" is to see that business or property used or in a state does not escape contribution to the cost of government because of its ownership elsewhere.

The fact that the appellant's firm exercised its opportunity, resulting from ownership of the appellant's membership, to have the orders of its non-resident customers executed in New York by other independent Exchange members at less than what the customers were charged is the only thing upon which the respondents can rest their claim of "business situs." This cannot be sufficient, because exercise of that opportunity is very far from any activity which has been or should be called "business" for taxation, service of process or any other purpose. It is inconceivable, for instance, that a Massachusetts business man can be said to be doing business in New York on the sole ground that he had and exercised the rights given him by a contract with a New York business man for preferential rates for services rendered in New York by that New York man in the name and with the capital of that New York man.

Wheeling Steel Corp. v. *Fox*, 298 U.S. 193, *supra*, apparently relied on by the respondents, is in reality authority for the appellant because all of the elements of control which established the essential "business situs" in West Virginia are, so far as applicable in the case at bar, ele-

ments of control peculiar to and localized with the appellant in Massachusetts. None of the items which showed a "business situs" in the *Wheeling Steel* case to be in West Virginia exist in New York in the case at bar to give color to the suggestion that the appellant's membership or "right" had a "business situs" there.

Without such a "business situs" the tax on the appellant is invalid.

III. The Unsoundness of the Respondents' Position.

The respondents endeavor to meet in three ways the manifest contradiction involved in saying that the appellant's membership had a "business situs" in New York, where the appellant carried on no business.

First, it is urged that an Exchange membership is property *sui generis* so bound up with the locality of the Exchange facilities and building that it has, in addition to situs at its owner's domicile, an additional or dual situs in New York, regardless of the transaction of business in that state. This is only a resurrection of the minority "doubts" in *Citizens National Bank* v. *Durr*, 257 U.S. 99, *supra*, and is therefore untenable.

Second, it is urged that the appellant was co-owner with the 1099 other members of the Exchange's property, and hence a partner in the business of operating a Stock Exchange in New York. As the property in New York, where the Exchange is located, is owned by a New York corporation, this is the same argument which was regarded as untenable by this Court in *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U.S. 69, *supra*. There, in holding shares of a non-resident shareholder, deceased, not taxable by North Carolina, in which state was located the principal business and over 66⅔ per cent of the assets of the corporation, this Court repudiated "the theory that the stock-

holder is the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock." 270 U.S. at 81. Furthermore, the Exchange is a membership and not a profit association; membership may be an incident of the member's business, but is not a business in itself. "The New York Stock Exchange transacts no business as such in the buying and selling of stocks. * * * The business therein transacted is that of the individual members." *People, ex rel. Lemmon,* v. *Feitner,* 167 N.Y. 1, 5, 60 N.E. 265, *supra.* Ownership of the Exchange building is certainly not a business of the members, since that is vested in a domestic corporation, taxable and taxed as such.

Furthermore, the respondents did not assess this contested tax as the appellant's share of income from the Exchange as a partnership. The Exchange does not file returns as a partnership under the applicable sections of the State Tax Law (chapter 60 of the Consolidated Laws of New York, article 16, section 364). The tax contested in this proceeding arose from the business of the partnership of Whitney & Elwell, which was conducted only in Boston (see appellant's tax return, R. p. 33). It cannot be sustained on some other theory. As pointed out above, page 11 of this brief, the Exchange membership is far more similar to a close stock corporation share than anything else. A non-resident stockholder is not subject to income tax for profit from the sale of his shares in the state where the corporation has its offices. *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U.S. 69, *supra.* Yet that is the logical result of this second suggestion of the respondents.

Third, it is urged that the activities of the appellant's firm in dealing with or having its orders executed by its New York correspondents constituted a business of the

appellant in New York. This cannot be so, both because the respondents themselves make no effort to tax the appellant for the profit resulting from those activities, and also because of this Court's decision in *Bank of America* v. *Whitney Bank,* 261 U.S. 171; *supra,* where very similar transactions were held not to constitute business for the purposes of service of process. If the correspondents' activities are not the non-resident's business for purposes of service of process or taxation, clearly they are not business sufficient to make valid an extraterritorial tax on an intangible by giving it a "business situs." An application of this suggestion would reach the impossible result of making every non-resident individual regularly giving, from points outside New York, orders for purchase and sale on the New York Exchange taxable in New York on his profits. The New York correspondents were independent contractors carrying on their business in New York. Their acts were not the acts of the appellant. The relationship between them and the appellant's firm was that of independent contractors as distinguished from one of principal and agent.

Three analogies existing between the appellant's case and hypothetical cases where clearly no tax could be exacted also illustrate the unsoundness of the respondents' position. The first analogy is the case of a resident of Connecticut who owned a large number of shares of the New York Telephone Company. Assume also, to make the analogy complete, that this man had free telephone service at his home in Connecticut, analogous to the fact that the appellant's firm could have orders executed on the Exchange by other members for less than a non-member. It is clear that New York could have no jurisdiction to tax this resident of Connecticut for profit resulting from the sale of his holdings in the New York Company or of rights or stock dividends received through his ownership of those

shares, even though he was taxable by New York on his salary earned and paid to him for services in New York (see article 416 of the Regulations of the New York State Tax Commission, printed in Appendix, *infra*, pp. 29-30). The only difference between that hypothetical case and the case of this appellant in New York is in the latter's favor, because he never did business and was not otherwise taxable there.

The second analogy is that of a non-resident owner of a life insurance policy with cash surrender value payable only at the insurer's office in New York. If the insured sells and assigns his policy for more than the cash surrender value, he has made a profit from the sale of an intangible payable only in New York, yet it is inconceivable that the profit is taxable as from property owned there.

The third is that of a Massachusetts business man who purchased the seating rights in a section of the grandstand where the world's series baseball games were to be played in New York and resold in Massachusetts tickets in that section at a profit to himself. The income resulting to the Massachusetts resident from this business is income at his domicile and clearly without New York's jurisdiction to tax.

IV. Conclusion.

The appellant's Exchange membership is intangible personalty with its situs at his domicile in Massachusetts. In order for a state other than Massachusetts to have jurisdiction to tax profit resulting from its sale as income from property owned there, the membership must have acquired a "business situs" in the other state.

There cannot be any business situs in New York unless business has been carried on there. Business carried on elsewhere certainly cannot create a business situs in New York.

The appellant and his firm, however their connection with their New York correspondents is described, were not by any definition carrying on business in New York. The applicable definition in Tax Regulations, article 415, does not include the appellant or his firm. The respondents never attempted to tax them on that basis. The requirements for determining whether or not the appellant or his firm conducted business in New York must be similar to those used in determining whether a taxable business was done there. It is a manifest contradiction to suggest that the word "business" can mean one thing when used alone and another when used with "situs."

There being no business carried on by the appellant or his firm in New York, there could be no "business situs" for his intangible property there, and hence nothing, profit from whose sale New York can tax as income from property owned there.

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APPENDIX.

REGULATIONS PROMULGATED BY THE TAX COMMISSION IN PURSUANCE OF SECTION 383 OF THE TAX LAW AND CONTAINED IN MANUAL 32 ISSUED BY THE STATE TAX COMMISSION.

"ART. 415. **Definition of 'business carried on' within the State.** A business, trade, profession or occupation (as distinguished from personal service as employee) is carried on within the state by a nonresident when he occupies, has, maintains or operates desk room, an office, a shop, a store, a warehouse, a factory, an agency or other place where his affairs are systematically and regularly carried on notwithstanding the occasional consummation of isolated transactions without the state. This definition is not exclusive. Business is being carried on if it is here with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit and yet not be engaged in a trade or business. If a taxpayer pursues an undertaking constantly as one relying on his profit therefrom for his income or part thereof he is carrying on a business or occupation. Thus a 'trader' in securities who trades regularly and constantly on his own account and makes it his business to trade as another makes it his business to run a mercantile establishment is carrying on a business or occupation. Its regularity or continuity need not be for a long period; the life of the business is not a material factor."

"ART. 416. **Sale of stocks, bonds and other securities.** Gains and profits of a nonresident from the sale, exchange or other disposition of stocks, bonds and other securities are not taxable and should not be included in gross income, except to the extent to which the same shall be a part of the income from a business carried on in the State of New

York, even though the sale or other disposition thereof may have been made within the State of New York or consummated on an exchange located within such state. Likewise, losses sustained from the sale, exchange or other disposition of stocks, bonds and other securities under like conditions are not deductible, except to the extent that they may be losses incurred in a business carried on within the state."

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CHARLES EL

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 218.

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Appellant,

v.

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Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR THE APPELLANT.

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The Facts Involved.

The respondents on page 2 of their brief take exception to the appellant's statement on page 6 of his brief that the New York correspondent firms of the appellant having business offices in New York who executed orders on the

Exchange for the appellant's firm did so "in their own names as principals . . ."

While it is true that the arrangements between the appellant's firm and the New York correspondents were set forth in a letter entitled "Customers' Agreement," being Exhibit A (R. pp. 69-72), which refers to the New York correspondents, addressees of the agreement, as "agents of the undersigned" (Exh. A; R. p. 69; fol. 207), it is also clear that in transactions of purchase or sale on the floor of the Exchange the name of the appellant's firm did not appear (R. 49; fol. 146). The New York correspondents bought and sold in their own name (R. p. 49; fol. 147). The appellant's firm had nothing to do with the payment, delivery and completion of the transactions in New York (R. p. 64; fol. 191). The appellant's firm was a margin customer of the New York correspondent (R. p. 51; fol. 152), the name of the appellant's firm appearing in the transaction only on the books of the New York correspondent (R. p. 49; fol. 147).

The respondents further state on page 3 of their brief that the appellant made a contribution to the Exchange for capital purposes in 1929. These contributions were made prior to 1929 (R. p. 53; fol. 159).

The Error in the Respondents' Agency Argument.

The respondents contend on pages 9 and 10 of their brief that the appellant's membership had a "business situs" in New York because the appellant was doing business there through an agent even though he never acted there personally. The argument assumes, correctly, that to establish a "business situs" in New York it is essential that the person whose property is said to have acquired the "business situs" shall have carried on business in New York and shall have used the property in that busi-

ness. Both elements are essential—business and the use of the particular property in the business. If either one is lacking, the property does not have the "business situs." The respondents' conclusion that the appellant or his firm was doing business in New York through the medium of an agent is unsound. An individual non-resident of New York who employs New York business men to buy or sell for him cannot, simply on that account, be regarded as doing business in New York.

A margin account of any non-resident of New York carried with one of the same firms that acted as the appellant's New York correspondent would be governed by the same agreement, Exhibit A (R. pp. 69-72), which the appellant's firm used. This clearly appears from the last paragraph of the agreement and the note thereto (R. p. 72; fol. 216) which made that paragraph inapplicable to the appellant's firm.

Obviously it cannot be said that the great multitude of persons living outside of New York who carry margin accounts for the purchase and sale of securities with New York brokerage houses are doing business in New York. They are not. It is the New York broker who does business in New York. And this situation remains the same whether he is denominated "agent" or anything else. The question is one of fact, and the fact is that the customer does business where he is and the broker alone acts in New York.

Suppose a Massachusetts corporation is required by its charter to do business only in Massachusetts: It would be absurd to say that the making by it of a contract like Exhibit A would be *ultra vires*, yet it would be if the contract meant that the corporation was to carry on business in New York. It would be equally absurd for New York to attempt to collect an income tax from all non-resident customers of New York brokers because section 351 of the income tax